No. 11,969.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EDWARD J. McBRIDE, doing business as Continental Press Service,

*Appellant,*

*vs.*

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

*Appellee.*

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## Amicus Curiae Brief on Behalf of the Consolidated Publishing Company in Support of Appellant's Petition for Rehearing.

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Leave of the Court having been first sought and obtained, the Consolidated Publishing Company files its brief as *amicus curiae.*

### Statutes Involved.

*Federal Communications Tariff* 219(8):

"Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop

or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law."

47 *U. S. C. A.* Sec. 202(a):

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

47 *U. S. C.* Sec. 406:

"The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ."

*Penal Code of California,* Sec. 337a:

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

"2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or

purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this Section; or

"6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

"This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive."

*United States Constitution, Amendments, Article I:*

"Congress shall make no law * * * abridging the freedom of speech or of the press; * * *"

*United States Constituion, Amendments, Article V:*

"No person shall * * * be deprived of life, liberty, or property, without due process of law. . . ."

## I.

## This Amicus Curiae in This Brief Seeks to Protect Its Own Substantial Rights of Liberty and Property, and at the Same Time the Rights of Numerous Other Concerns Covered by the Tariff and Potentially Gravely Affected by the Decision of This Court.

The interest of this *amicus curiae,* Consolidated Publishing Company, in the outcome of this case is two-fold in character. In one aspect, it is based upon serious concern for its own substantial rights; in another, upon concern for the rights of other press, publishing and other concerns subject to Federal Communications Commission Tariff 219(8) or similar rules whose rights to liberty and property are deemed to be potentially endangered by the decision reached by this court in its opinion of December 1, 1948.

Considering the first aspect, Consolidated Publishing Company sought leave of this court to file this brief because its interest in the outcome of the instant case is one involving substantial rights of property and liberty. As is shown by the record, Consolidated Publishing Company operates a publishing concern of considerable dimension, owning printing presses and other equipment of the value of approximately $100,000. At its plant at 615 North La Brea Avenue, Los Angeles, California, are employed approximately sixty-five workers.

As the record shows, the Consolidated Publishing Company was until April 2, 1948, a customer of the appellant Continental Press Service, receiving from appellant

through wire facilities of appellee Western Union Telegraph Company news and information used by Consolidated Publishing Company for dissemination to the purchasers of the racing publications published by it.

On the above mentioned date, appellee Western Union Telegraph Company shut off the service between appellant and the Consolidated Publishing Company, upon the sole supposed justification that the action was being taken in accordance with Federal Communications Commission Tariff 219(8) and a notice from the Attorney General of California. Appellee has disavowed any belief or proof by it that appellant or Consolidated Publishing Company are in fact guilty of any wrong-doing.

Following this action by the utility, the instant suit was brought by appellant against appellee Western Union Telegraph Company to compel restoration of service. The Consolidated Publishing Company is not now, nor was it originally, a party to this action. However, at the time of the bringing of the action it was believed that in the course of the trial upon the merits the unfolding of the evidence would naturally lead to the presentation of evidence by Consolidated Publishing Company. Thus it would normally have been given an adequate opportunity to present its position and establish, for its part, that it had committed no wrong, and was entitled to the opportunity to continue purchasing of appellant the vital service upon which it depends for information used in its publishing business. Since it was the appellant, and not Consolidated Publishing Company, which is the direct

customer of appellee, the suit was brought by appellant as such customer.

As the case has developed, no trial has ever been had of the issues of fact which appellant has sought to have adjudicated. Under the decision of this court of December 1, 1948, it would appear that no trial of the merits of substantial claimed defenses may ever be had, nor the action of the appellee in discontinuing service ever be challenged in any way in any forum.

Therefore, to protect its substantial rights of property and liberty, and to attempt to assure that a judicial hearing will be held on the merits of the question of the right of appellant to employ facilities of appellee, and of Consolidated Publishing Company to have the opportunity to purchase appellant's information service, Consolidated Publishing Company has sought and been granted leave to file this brief presenting discussion bearing upon issues necessarily involved in this court's final determination of this case.

Turning to the second aspect of the interest of the *amicus curiae* in this case, Consolidated Publishing Company believes that the court's opinion of December 1, 1948, raises important questions of Constitutional law, of grave concern not only to itself but also to all the many concerns receiving service under Federal Communications Commission's Tariff 219(8) and others of similar import.

Under an interpretation earnestly deemed correct by this *amicus curiae,* this tariff would not be challenged.

However, under the view taken thus far by this court it is believed that its interpretation raises the following constitutional questions of general concern:

(1) Does not this court's interpretation of Federal Communications Commission's Tariff 219(8) deny due process of law by denying to everyone of the many tariff-subject concerns the right ever to be heard in any forum on the actual facts regarding a deprivation of liberty and property which may be based solely upon the unsupported notice and opinion of any federal or state law enforcement agency?

(2) Does not this court's opinion of December 11, 1948, misconstrue and hence fail to apply the holding of a California decision required to be followed by this court under the Federal Constitution, Federal decisions, and the Rules of Decision Act?

(3) Does not this court's interpretation of this tariff purport to give appellee, in combination with any law enforcement agency, such right, without review, arbitrarily to license and censor the dissemination of information by a form of prior restraint, as is in violation of the guarantee of the right of freedom of the press and of speech contained in the First Amendment to the Federal Constitution?

To protect the rights of other tariff-subjected publishing and other concerns, as well as its own rights, and to attempt to have this court establish what is deemed to be a correct rule and interpretation on these important questions for the future, the Consolidated Publishing Company herewith presents the following discussion for the use of the court in making its determination whether Appellant's Petition for Rehearing should not be granted.

## II.

## This Court's Interpretation of Federal Communications Tariff 219(8) Would Render It Invalid as Forbidding a Hearing Upon the Merits, and so Denying Due Process of Law, to Leased Wire Service Users, Who, Charged Only by a Law Enforcement Agency's Unsupported Notice With Violation of Law Are, as a Result, Forever and Without Review Deprived of Their Vital Service.

### A. Such Tariffs Are Designed to Fulfill a Plainly Limited Purpose.

What is sought by appellant in this case directly, and by Consolidated Publishing Company indirectly, is simply the opportunity to establish by fair trial in open court that the service between appellant and Consolidated Publishing Company has at no time been supplied contrary to law, and has at all times been used by appellant and Consolidated Publishing Company in a proper and legal way in the conduct of their respective businesses.

The effort of appellee has been, in effect, to establish the extraordinary principle that the law precludes and forbids the possibility of such trial upon the merits, quite regardless of the truth of appellant's stoutly maintained contention that the facility was being legally and properly supplied at the time of the receipt of notice of claimed illegality.

Appellee does not and has not, by way of answer or in its affidavit, made any charge or allegation of wrong doing by either appellant or the Consolidated Publishing Company. Rather, its position has been confined to the argument that the tariff in question permits it irrevocably, upon receipt of notice from any law enforcement agency

that the service is being supplied contrary to law, forever to bar service to those so complained against. The tariff is said entirely to abrogate the power of a court of law to decide upon hearing whether the service was in fact being supplied contrary to law.

Therefore, many of the issues of this case resolve themselves into an interpretation of the applicable Federal Communications Tariff 219(8), having the force and effect of law.

It is respectfully but earnestly submitted that the interpretation made by this court of the tariff is one which upon examination proves to be strained, inaccurate, and unreasonable.

It will be borne in mind throughout the ensuing discussion that appellant and this *amicus curiae* are not seeking in this proceeding to attack the validity of the tariff. What is in issue here is merely a determination of what that tariff means, and how it ought to be construed.

We will now consider the circumstances under which such tariffs are written and the purposes which they are designed to achieve.

Public utilities have a general obligation imposed by law to serve customers on an impartial basis. And in particular it is provided by the Communications Act, 47 U. S. C. A. 202(a) that common carriers engaged in interstate communication by wire or radio must furnish such service to anyone who makes a reasonable request for it. This section of the Act also makes it unlawful for any common carrier to make "any unjust or unreasonable discrimination in . . . facilities, or services in or in connection with like communication service, directly or indirectly by any means or device. . . ."

When a public utility is notified by a law enforcement officer that its supplying of service is in violation of law, it has during the period prior to adjudication no certain way of determining the truth of such notice.

As is said of such a situation in the brief of the California Public Utilities Commission *amicus curiae,* at page 28:

> "Appellee's position is a delicate one. On the one hand, it must be vigilant to see that the furnishing of service by it does not result in aiding or abetting unlawful conduct and, on the other hand, it must be careful not to take action that might subject itself to a charge of discrimination in the furnishing of service."

Appellee utility thus, like other utilities, is therefore desirous of protecting itself during the period which follows receipt of notice of illegal supply of service and which precedes the adjudication on the merits that a customer believing himself wronged may proceed to secure under the express terms of the Federal Communications Act.

The protective step that is often sought to be taken is the passage of a law, or of some rule or regulation having the force of law, which provides that the utility shall have the right, on receipt of a warning notice from a law enforcement agency that service is being supplied to a customer contrary to law, of discontinuing service to such customer. Thus, as to the uncertain period necessarily preceding an adjudication of the merits, protection is sought by the utility.

Of a like tariff rule it was said in the case of *Partnoy v. Southwestern Bell Telephone Company,* 70 P. U. R. (N. S.) 134 (Reprinted as Appendix A in the *Amicus Curiae* Brief of the California Public Utilities Commission).

> "Said rule operates to relieve the regulated Company from being placed in the dilemma of choosing either the course of continuing service under threat of criminal prosecution as an accessory, if the appellant is actually guilty of a crime, or discontinuing service under the threat of civil liability in the event the accusations are wrongly made by the enforcement officers." (Page xvii.)

Thus such rules are designed in certain situations to serve as a temporary shield for the utility pending adjudication. But they may not be construed as denying the adjudication which alone can properly determine whether a customer is entitled to the restoration of facilities.

For public utilities have as their primary duty the provision of service, on a non-discriminatory basis, to those who seek it. They are not the final measures of their own rights and duties.

Such questions are determined not by the utility itself, but, upon the seeking of review by a customer, by judicial or quasi-judicial hearing to settle the merits of the controversy.

But, it is contended by appellee, though normally the refusal or discontinuance of service by a utility is subject to court review, that general rule is without application here. Why is this thought to be so? Solely because of the existence of a tariff, whereunder the right is given to the utility to discontinue service upon notice of a law

enforcement agency that the service is being supplied contrary to law.

This position is believed to be a legally erroneous and a constitutionally impermissible one. It will be the purpose of the following discussion to attempt to demonstrate why this is so, and to point out the pressing reasons why the tariff ought not to be given broad implied meaning (that of preventing judicial review) far beyond its narrower and obvious one, which has already been discussed.

**B. The Right Not to Be Discriminated Against in the Opportunity of Access to Leased Utility Facilities for Use in a Publishing Business Is a Right of Liberty and Property Protected by the Due Process of Law Guarantees of the Federal Constitution.**

What kind of right is it that this suit was brought to establish? It is the right of appellant to furnish information through its transcontinental wire, leased from appellee, to the Consolidated Publishing Company, and the right of the Consolidated Publishing Company to have the opportunity to purchase such information, to be used in its business of publishing periodicals supplying racing and other information.

Inability of Consolidated Publishing Company to secure such information would of course have a severely unfavorable effect upon its ability to carry on its publishing business.

Is the right of Consolidated Publishing Company and other publishers to carry on their business such a right of property or liberty as is protected by the due process of law provisions of the Federal Constitution?

Preliminarily it may be noted, and will hardly be disputed, that insofar as they apply to this particular problem, the scope of the due process clauses of the Fifth and Fourteenth Amendments are equivalent. As is said in *Heiner v. Donner,* 285 U. S. 312, at page 326:

> "The restraint placed imposed upon legislation by the due process clauses of the two amendments is the same."

And see:

> *Hibben v. Smith,* 191 U. S. 310, 325;
> *Coolidge v. Long,* 282 U. S. 582, 596.

It has long and clearly been recognized by the Supreme Court that the right to engage in business is a right protected by the due process clause. Thus, in *Meyer v. Nebraska,* 262 U. S. 390, where there was involved the right of a teacher to teach a foreign language in a school, the court stated that there was included among the liberties guaranteed by the Fourteenth Amendment, "the right of the individual . . . to engage in any of the common occupations of life . . ." (p. 399).

In the case of *New State Ice Co. v. Liebmann,* 285 U. S. 262, the court held to be protected by the Fourteenth Amendment the right to enter the business of making ice. Said the court at page 278: ". . . a regulation which has the effect of denying *or unreasonably curtailing* the common right to engage in a lawful private business" (emphasis supplied) violates the Amendment.

A state statute restricting corporate acquisition of drug stores to corporations owned entirely by licensed pharmacists was held invalid in *Liggett Co. v. Baldridge,* 278 U. S. 105, the court saying at page 111:

> ". . . appellant's business is a property right [citations], and as such is entitled to protection against state legislation in contravention of the Federal Constitution."

It is quite clear from the principles enunciated in the three cases last referred to, and in many other cases, that the Consolidated Publishing Company and other publishers are engaged in businesses protected by the guarantees of the due process of law provisions of the Constitution. From the basic proposition that the business itself is a protected property right, there follows the aiding corollary that the incidents and operation of the business may not be regulated in an unreasonable or unduly restrictive way. Thus, in the case of *Burns Baking Co. v. Bryan,* 264 U. S. 504, the Supreme Court held invalid a Nebraska statute requiring bread to be baked only in certain sizes (to prevent palming off of smaller for slightly larger sizes). Such regulation was held to be one not reasonably necessary to protect purchasers against fraud. Even though the purpose was a good one, the means chosen were improper, and unduly difficult to comply with. Said the court at page 513:

> ". . . a state may not, under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

In the present case, the effect of the court's decision that appellee need never answer for its shutting off of

service though it would not in terms deny the right of Consolidated Publishing Company to continue in the publishing business, nor of appellant to continue in its business of dissemination of information, would so unreasonably curtail and restrict those rights as to fall within the constitutional prohibition.

Consolidated Publishing Company, appellant, and others engaged in publishing or disseminating information are engaged in businesses protected by the due process clause. These businesses then, may not be taken away from them, nor their operation restricted save in compliance with the requirements of due process of law.

**C. The Tariff, as Construed, Unreasonably Denies to Appellant and All Others Subject to the Tariff That Hearing Upon the Merits Which Due Process of Law Demands.**

It is clear that under this court's interpretation of the tariff there is in no way provided, for the protection of the substantial rights of liberty and property in operation of their businesses by tariff-covered concerns, that procedural due process of law which is guaranteed by the Constitution.

A full definition of the majestic concept of due process of law is of course impossible to render, and is besides quite unnecessary for the determination of individual cases. Whatever else that concept may include, certainly it must encompass the concept of hearing by a tribunal prior to any judgment depriving persons of life, liberty or property. "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." (Justice Cardozo, speaking for the Supreme Court in *Palko v. Connecticut,* 302 U. S. 319, 327.)

Or, as the principle is stated in an earlier case:

> ". . . there are certain immutable principles of justice which inhere in the very idea of government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." (*Holden v. Hardy,* 169 U. S. 366, 389-90.)

Down through all the years this basic minimal requirement of due process remains undiminished. Thus in the modern case of *Anderson National Bank v. Luckett,* 321 U. S. 233, there was challenged a deposit escheat system under which the state after a time took over inactive accounts and was substituted for the bank as the debtor. It was contended that a person making claim to payment and being refused by the state officer would not be accorded due process of law in determination of the question of his right to payment. The standard applied by the court was this:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." (Page 246.)

Examining the procedure under the statute, the court held that due process requirements were met because:

> ". . . there is *full opportunity to the depositors to be heard* by the State Commissioner, whose decision is subject to court review." (Page 246.) (Emphasis supplied.)

And see:

*Rees v. City of Watertown,* 19 Wall. 107.

As has been pointed out, the effort of Consolidated Publishing Company in this brief, and of appellant throughout the case, has been and is precisely the securing of an opportunity to be heard and to defend their substantive right. (*Cf. Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U. S. 673, 678.) The opinion of this court rendered December 1, 1948, holds that a tariff prepared by appellee, as construed, effectively denies the appellant such an opportunity, and that it must rest content with this sudden and drastic loss of its right to service.

The difficulty in the opinion of the court is not at all that it metes out treatment unduly harsh to the guilty. Rather, it is that under the decision there may be meted out to the guilty and the innocent alike, indiscriminately and without trial, treatment appropriately rendered to the guilty alone, after the fact of their guilt has been established by the decision of a judicial tribunal upon full hearing.

As was well said in the case of *Rees v. City of Watertown,* 19 Wall. 107:

> ". . . whether in fact the individual has a defense . . . or is without defense, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest." (Page 122.)

**D. In the Light of the Basic Principles Above Discussed, Clearly the Requirement of Notice by a Law Enforcement Agency Would Be an Improper and Inadequate Substitute for the Full and Reviewable Hearing Requirements of the Due Process Clause.**

(The making of the following partial catalog of errors into which law enforcement agencies might fall, when sending a notice to a utility that it is supplying service

contrary to law, implies no innuendo against any actual law enforcement agency. It is simply designed to illustrate the error and constitutional impropriety of permitting non-judicial agencies, regardless of their capabilities within their own proper spheres of activity, to serve, in effect, as final arbiters of law and fact concerning such important matters involving rights of liberty and property as are here involved).

The notice provided by the tariff can in no way serve as a proper substitute for the full and fair hearing which a customer demanding the right to utility service would otherwise be entitled to before a judicial or quasi-judicial tribunal charged with determining the merits of the controversy.

To begin with, as a matter of interpretation it may be said that it would be indeed a startling and dubious delegation and abdication of power under which federal legislation would provide as to a matter of federal right that the usual full and factual hearing by a specific tribunal, followed by review, should be replaced by a bare notice, basable on incomplete or entirely absent hearing, quite unreviewable, and rendered by any one of a myriad of law enforcement officers of any of many different jurisdictions.

Under our law the police and prosecution agencies are traditionally not the final adjusters of the law, but only the enforcers of it. They do not have facilities for the holding of full hearings upon questions of fact and law. Nor indeed is that their function. Rather, their efforts are directed primarily to the routine enforcement of the law, and to the apprehension of suspected criminals and their prosecution.

Yet under this court's interpretation of Federal Communications Tariff 219(8) the adjudication of such persons would be the only one required to deprive tariff-subject customers of vital rights guaranteed by the Federal Constitution. Indeed, not only would such officers make the adjudications; but their adjudications would be unreviewable, whether or not based on a proper hearing or an improper one, or on none at all.

It would not matter that an error of fact might have been made—even one so gross as a complete error of identity.

It would not matter that the law enforcing agency might have been guided by passion or prejudice.

It would not matter that the law enforcement agent—perhaps a person of very moderate legal sophistication—might, in notifying of a violation of law, have committed an error of law.

None of these things would matter at all. The notice would still be the end of the proceeding—the complete and perfect basis for a utility company's action (the depriving a customer of service) normally reviewable, but now, strangely, grown sacrosanct, judicially unassailable.

It is respectfully submitted that the unreasonableness of such a holding is a most powerful argument in behalf of another interpretation limiting the tariff to a narrower meaning, and, consonant with relevant laws and with decisions of an analogous kind, next to be discussed, permitting factual determination of the issue whether service ought to be restored or not.

**E. The Lack of a Hearing Before the Discontinuance of Service in No Way Implies a Lack of Right to a Hearing After Such Discontinuance.**

It is true that situations sometimes arise wherein a compelling public or private interest permissibly requires the taking of action prior to the granting of a hearing to those affected.

But, merely because a hearing cannot be granted first, it may not be assumed that in such situations no hearing shall be granted at all. Indeed, the urgent need for a full and fair hearing in such situations is apparent, in order that those acted against shall suffer as little as possible as a result of the extraordinary pre-hearing action which only the unusual exigencies of the situation have justified.

As one of many examples of hearings following upon rather than preceding the taking of action, we may consider the case of *United States v. Illinois Central Ry. Co.*, 291 U. S. 457. Here there was challenged a provision of the Inland Waterways Corporations Act empowering the Interstate Commerce Commission acting *ex parte* to order all connecting common carriers to join with water carriers in through routes, joint rates, and other matters.

The court gave full and serious consideration to the contention that the *ex parte* character of the order rendered the statute violative of due process. The court's opinion adverted at length to a commission opinion wherein a commissioner construed the statute as requiring that, if an interested carrier made protest,

> "It would then be our duty to hear said complaint and decide said matter before said rates become effective . . . in the event such a hearing is not had and the matter disposed of before the effective date

> of such rates, it would be our further duty temporarily to suspend them until said matter is decided. . . ." (Page 461.)

The commissioner declared that this procedure would be necessary to comply with the requirements of due process of law.

Upon this basis, the court upheld the constitutionality of this statute against the due process attack. The court's opinion said (p. 461): "This is an admissible construction of the statutory proceedings."

Thus, by construction of the statute to require, after the *ex parte* setting of the rate, a full and fair hearing upon request of interested parties, the Interstate Commerce Commission and the Supreme Court upheld the statute against a due process attack that would otherwise have been irresistible.

*Cf. Yakus v. United States,* 321 U. S. 414, 436-7.

Again, in the case of *Fahey v. Mallonee,* 332 U. S. 245, the court considered the question of the constitutionality of a statute whereunder hearings regarding the appointment of conservators for improperly managed or failing federal reserve savings and loan associations were held after rather than before the appointing of such conservators. Said the court, speaking through Mr. Justice Jackson, "This is a drastic procedure." But it concluded, because of "the delicate nature of the institution and the impossibility of preserving credit during an investigation," and "in the light of the history and customs of banking," which the court called one of the longest regulated and most closely supervised of public callings, "we cannot say it is unconstitutional." The court cautioned, however, that

the use of supervisory authority in such manner (*i. e.*, prior to hearing, even though closely followed by full hearing) was "a heavy responsibility to be exercised with disinterestedness and restraint." (Page 253.)

Compare the interesting case of *Edison Co. v. N. L. R. B.*, 305 U. S. 197, wherein, when it was urged by the board that "due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal," it was answered by the Supreme Court that "this rule assumes that the appellate review does afford opportunity to present all available defenses." (Page 234.)

Another and somewhat striking example of the principle that prior action, though required and permissible, does not foreclose future factual and legal review, is to be found in an extremely broad and familiar area of the law.

This is the field of eminent domain. Here the sovereign or those authorized under it (including incidentally such public utilities as appellee itself) in certain cases may take immediate possession of property sought to condemned, upon the commencement of condemnation proceedings. It would hardly be contended by anyone that simply because such preliminary taking is permissible, a judicial hearing thereafter consequently ceases to be required. The right to such a taking in advance exists, without question; but it by no means forecloses the final answers to legal and factual issues as to the right of the sovereign or its instrument to condemn the property involved. Laying quite aside all problems of valuation, the owner of property sought to be condemned is entitled to a full judicial hearing on such matters as whether the use for which the property is sought is a public one and whether, if the use be public, the property involved is reasonably necessary for such use.

The condemnation proceeding may, and not infrequently does, end with an originally dispossessed owner, successful upon judicial hearing, restored to the possession of his property. So in the instant case also, regardless of any temporary right of the utility to discontinue service between appellant and Consolidated Publishing Company, the appellant unquestionably ought to have the right to a hearing wherein there will be determined the dispute whether the service ought properly to be restored or no.

In the present case as in situations discussed above, provision for a full and fair hearing after the taking of action against appellant is not only a permissible but a constitutionally required interpretation of the tariff.

**F. The Principle of Full Hearing Upon the Merits, in Cases of Discontinuance of Supplying of Facilities Upon Receipt of Notice of Wrongdoing, Has Been Vigorously Affirmed and Applied in Important Cases Urged in Behalf of the Position of Appellee.**

Though appellee and the *amicus curiae* brief of the California Public Utilities Commission have sought to convince this court that a trial upon the merits is neither necessary nor required, several of the cases most urgently cited by them support an exactly opposite viewpoint.

A prominent example of this is to be found in the case of *Howard Sports Daily v. Weller,* 179 Md. 355, 18 Atl. 2d 210, much relied upon by appellee. Under the tariff there involved, the special contract service was cancellable upon a minimum of one day's notice by either party. The telegraph notice received a notice from the United States Attorney that the service was being supplied to a customer contrary to law. It thereupon promptly terminated service.

The utility customer was held not to be bound in any way by this notice and termination. Rather, under Maryland procedure, the utility customer was then given a full trial before the Maryland Public Service Commission, which found upon evidence presented to it that there had been proper cause for the shutting off of service.

The upper court, upholding the judgment against the customer on this basis, pointedly quoted the great statement from *Truax v. Corrigan,* 257 U. S. 312, still good law upon this point:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protections of the general rules which govern society." (Page 332.)

In the Howard case the customer, right or wrong, was deemed entitled to his day in court. And no more is being striven for here than was granted there—the right, after discontinuance of service, to a factual trial of the issues before a tribunal of judicial character.

So important did worthy counsel for the California Public Utilities Commission deem the case of *Partnoy v. Southwestern Bell Telephone Company,* 70 P. U. R. (N. S.) 134, that the opinion is set forth in its entirety in an appendix to the brief, at a length of twenty-seven pages.

In that Missouri case, under a tariff of similar import with that here in question, discontinuance of service was

threatened by the utility following receipt by it of notice from the governor and the attorney general was being used as an instrumentality to violate the law. The customer complained against the service discontinuance. He was not denied, as was the customer appellant here, a trial upon the merits of his contention that he was entitled to the continuance of service.

Instead, represented by five attorneys, he was accorded a two day hearing before the Missouri Public Service Commission. The Commissioner's review of the testimony given at this hearing occupies no less than ten pages of the appendix (Brief *Amicus Curiae* of California Public Utilities Commission, Appendix A, pp. iv-xiv) and leaves no doubt as to the extremely thorough and meticulous character of the hearing given complainant.

On the contention that the rule denied to the complainant his right to service without due process of law, the commission wisely ruled:

> "Said rule in itself cannot be held to deprive the complainant of his property, *i. e.,* the right to telephone service without due process of law, *unless the action of the company in cutting off complainant's service under said rule also operates to leave the complainant without recourse in the event said service has been terminated without justificable cause.* Thus, in the instant case, the complainant was afforded the opportunity to show that the notice given by the governor and attorney general to the company was unsupported by fact, and the Commission in the exercise of its control over the Company is empowered to order said service restored. . . .

> ". . . said rule in itself in no wise operates to deny subscribers the right to test its application to their particular use of the telephone service in the event the right to such use is challenged by law enforcement officials. . . ." (Brief *Amicus Curiae* of California Public Utilities Commission, Appendix A, pp. xx-xxi.)

Thus the position of the Commission in the Missouri case coincides most markedly with the one taken by this *amicus curiae* in the instant case. In such a situation as is here presented, a full hearing must be given before a tribunal. The tariff can in no way bar, without constituting a violation of due process, subsequent review upon the insistence of a complaining customer desiring to show that the service has been cut off without the existence in fact of justifiable cause.

It clearly appears that in the above-cited cases the subscriber to the intrastate wire facilities was accorded a fair hearing before an appropriate tribunal under the applicable state law. Due process similarly requires that appellant, a subscriber to Western Union's interstate Morse wire facility, be accorded a hearing of like character under Federal law. Section 406 of the Federal Communications Act specifically provides appellant with a remedy in the district court to compel restoration of his leased wire service. Therefore, it is plain that this tribunal is the one wherein must be held the constitutionally-required hearing as to whether or not at the time of the notice service was being supplied contrary to law.

## III.

## This Court, in Its Decision of December 1, 1948, Has Misconstrued and Hence Failed to Apply the Holding of the California Case, People v. Brophy, Which Holding It Is Required to Follow Under the Constitution and Applicable Choice of Law Rules.

### A. The Always-Existent Requirement That Federal Courts Must Follow State Decisions Has in Recent Years Been Broadened and Given Compelling Force.

Since the earliest days of our nation, much legislative and judicial effort has been expended in solution of the problems raised by our federal system's concurrent jurisdiction of state and federal courts. In 1789 there was passed Section 34 of the Federal Judiciary Act, which, as somewhat amended, presently provides (28 U. S. C. A. 1652):

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The case of *Swift v. Tyson,* 16 Pet. 1, by judicial interpretation, excepted certain limited questions of so-called "general law" from this requirement.

In the modern case of *Erie Ry. Co. v. Tompkins,* 304 U. S. 64, even this small exception was wiped out. It was here held that the exception had been violative of the Federal Constitution, as well as being based upon a misinter-

pretation of the Rules of Decision Act. The court said flatly:

> "Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State." (Page 78.)

In later cases, the wide sweep of *Erie Ry. Co. v. Tompkins* has been repeatedly manifested. Thus, federal courts are required to follow the announcements of the state law even though they believe that the rule is unsound in principle or that some other is preferable. (*West v. American Telephone and Telegraph Company,* 311 U. S. 223.) Herein it was declared also:

> ". . . the obvious purpose of 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be valid in the state courts, the other to be availed of in the federal courts, only in cases of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision, whenever the highest court of the state has not spoken."

In the case of *Six Companies v. Highway District,* 311 U. S. 180, 188, it was similarly held that a federal court was required to apply an announcement of the state law made by an intermediate state appellate court.

In the same vein, it was stated in the case of *Fidelity Trust Co. v. Field,* 311 U. S. 169:

> "An intermediate state court declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more con-

vincing evidence of what the state law is, should be followed by a federal court in deciding a state question." (Pp. 177-8.)

See too:

*Stoner v. New York Life Insurance Co.,* 311 U. S. 464, 467.

The general rule applies in equity cases. (*Ruhlin v. New York Life Insurance Co.,* 304 U. S. 202.) This decision was reached even while the Rules of Decision Act still spoke of "trials at common law," rather than broadly of "civil actions," as it does today.

**B. This Court's Opinion Misconstrues and Fails to Follow the Holding of the Binding California Case of People vs. Brophy.**

This court has said in its opinion, in discussing the meaning of the tariff's phrase "contrary to law":

> "It is not necessary that there be a guilty participating of the sender of the messages to the drop. The guilty use of the drop in receiving the messages is enough to show an illegal use of the wire's service." (Page 3, last four lines.)

We turn now to a discussion upon principle of the consonance of the conclusions of this court with the holding of the California court in the case of *People v. Brophy,* 49 Cal. App. 2d 15, petition for hearing by the California Supreme Court denied February 5, 1942.

The California District Court of Appeals, an intermediate appellate court, held that since the furnishing of racing information even to bookmakers, and even knowingly, and the receipt of such information by bookmakers, would not be in violation of any law, an affidavit concerning such furnishing of racing information was not relevant to any possible issue in a suit brought by the utility customer to enjoin the discontinuance of service under the above quoted tariff.

The California court said at page 33:

> "Respondent's claim that the furnishing of racing news to bookmaking establishments by telephone constitutes an aiding and abetting in a violation of section 337a of the Penal Code is without merit. *It is not the transmission by use of a telephone of information concerning the results of probable results of horse races that constitutes a violation of the quoted Penal Code section,* but it is the use which persons may make of such information in the acceptance of bets or maintaining places for the reception of bets that constitutes a violation of the law." (Page 33.) (Emphasis supplied.)
>
> "Furthermore, the furnishing *or receiving* of racing or sporting information is not gambling and is not a crime." (Page 34.) (Emphasis supplied.)

The California court is thus holding with utmost clarity, and most importantly, that the use made of a bookmaker's telephone in receiving racing information would not be a crime, even though the later use made *of the information*

*itself* (not of the telephone) in the acceptance of bets or maintaining places for the reception of bets may constitute a crime.

Yet the opinion of this court states that "The guilty use of the drop in receiving the service is enough to show an illegal use of the wires' service." The fact is that the California court with unquestionable precision has held, as the above quotations show, that the use of communications service to receive the messages is *not* a "guilty use." Therefore the use of the drop (a legally innocent act under the California holding binding upon this court) is *not* enough "to show an illegal use of the wires' service," as this court has said. Neither the use of the telephone (or here the analogous drop) knowingly to furnish information to bookmakers, nor the later use of the information thus received by bookmakers in accepting bets or maintaining an establishment for receiving bets could, in the face of the sharp distinction drawn on this issue by the California court, make guilty the "use of the drop in receiving the messages."

It is submitted that the foregoing quotations and their immediately-following paragraphs of analysis and comparison of decisions, though brief, yet comprise a sufficient and self-contained demonstration that this court has indeed misconstrued the controlling *Brophy* case in a vital respect. Any belaboring of this shortly-put but important point would be tedious and repetitious, and of no additional assistance to this court.

## IV.

## The Opinion of This Court Misconstrues the Transcript of Record to the Detriment of Consolidated Publishing Company.

It appears that this court has misconstrued the record in such a way as to misinterpret the position of the Consolidated Publishing Company and the entire nature of the relief sought in this suit.

Thus, the court states:

> ". . . McBride seeks to 'compel the restoration to him' by the Telegraph Company of the telegraph wire service to transmit track news between cities in eastern states and California cities and the use of Morse telegraph instruments, called drops, in the latter cities, which telegraphically receive such news." (Page 1, line 2.)

This is not the fact, since appellant seeks only the furnishing of facilities between itself and Consolidated Publishing Company. This is plainly demonstrated by appellant's prayer in his complaint. [Tr. 11, 12.]

The court further states:

> "McBride's racing news from the race tracks of other states was sold to a California corporation, Consolidated Publishing Company of Los Angeles. *Through the latter's direction,* the out of state racing news was received through the drops in various places in California." (Page 4, line 2.)

It is nowhere shown in the Transcript that it was through any direction of Consolidated Publishing Company that the news was received "in various places in California." The record is to the contrary. For example, it is alleged by appellant in his complaint that

> "Each of Plaintiff's customers receives its sporting and racing news service by direct connection with the main interstate Morse wire." [Tr. 3-4.]

The court's finding on this point consists only of a denial based upon lack of information and belief. [Tr. 80.]

It is highly probable that these noted misconceptions by the court significantly infected with error its views of what the facts were to which the holding of the *Brophy* case should be applied. For this reason, as well as generally to point out to the court the actual relation of the Consolidated Publishing Company to the total situation, these misconceptions have been pointed out.

## V.

## This Court's Interpretation of Tariff 219(8) Would Render It Invalid as a Weapon of Censorship and Prior Restraint on Publication, Thus Denying to Those Subject to the Tariff and Their Customers That Freedom of the Press Which Is Guaranteed by the First Amendment.

Virtually every modern newspaper is heavily dependent for its news and information upon service provided by one or more of a number of generalized or specialized news services. Such news services are wire facility customers of appellee or of other utilities with tariffs of similar import.

Under the interpretation given Tariff 219(8) by the December 1, 1948, opinion of this court, such tariffs may be used by any police or prosecution agency as a most powerful weapon to impose upon printed publications a brutally effective and arbitrary system of censorship and prior restraint upon publication. For newspapers cannot survive without wire news service; and these wire news services, under the opinion of this court, may be barred to them forever without right of review if any law enforcement agency notifies the utility owning the communication facility through which service is received that such service is being received contrary to law.

Thus plainly the mere threat of such notice would suffice to bring any newspaper to terms. Under the court's interpretation of the tariff any law enforcement agency might, if so inclined, exact toll or compel obedience, under penalty of virtual journalistic death, to whatever political credo it deemed proper.

Such throttling of publishing concerns is forbidden by the First Amendment to the Constitution, prohibiting the passage of laws abridging the freedom of the press.

It is clear under modern decisions that the unconstitutionality of such a control would not be averted by its indirect nature. Thus, in the case of *Grosjean v. American Press Company,* 297 U. S. 233, the Supreme Court held invalid a Louisiana statute which in form purported only to levy a tax upon newspapers measured by circulation, but in reality sought to control the press by a subtle prior restraint.

Decisions particularly applicable to the situation of appellant and the Consolidated Publishing Company show that they are included within the broad scope of the amendment's protection. As was said in the case of *Lovell v. Georgia,* 303 U. S. 444, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." (Page 452.)

In writing the opinion of the court in *Near v. Minnesota,* 283 U. S. 697, Chief Justice Hughes commented acidly of an effort to evade the amendment's protection:

> "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." (Page 720.)

This same case furnishes still other strong evidence of the Constitution's powerful protection against any kind of prior restraint on press publications. The opinion of Chief Justice Hughes held that even if every publication

of a scurrilous newspaper violated someone's civil rights or some criminal law, the preliminary freedom from censorship could not be abrogated.

In this case in a dissenting opinion by Justice Butler at pages 733-4, there is quoted a passage from Blackstone's Commentaries (Book IV, page 152):

> "To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the revolution (of 1688) is to subject all freedom of sentiment to one man."

But this court's interpretation of Tariff 219(8) would subject freedom of sentiment to any one or all of a hundred or a thousand men. It is therefore again respectfully submitted that the very unreasonableness of such a tariff interpretation should sufficiently militate against its adoption by this court.

## Conclusion.

This *amicus curiae* respectfully submits that the decision of this Honorable Court is erroneous in the particulars above discussed, and that Appellant's Petition for Rehearing should be granted for the full presentation of the important questions involved.

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